

# **DISCLAIMER**

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## **PETITION OF**

**UNITED TELEPHONE-SOUTHEAST, INC.**

**CASE NO. PUC-2002-00231**

**For Declaratory Judgment  
Interpreting Various Sections of the  
Code of Virginia, For Injunction  
Prohibiting the City of Bristol from  
Providing Telecommunications  
Services in Violation of State Law  
and for Other Relief**

## **HEARING EXAMINER'S RULING**

**March 25, 2003**

On March 12, 2003, United Telephone-Southeast, Inc. ("Sprint") filed its Motion for Protective Ruling ("Motion") in which it offered a proposed protective agreement for the handling of confidential and competitively sensitive information in this proceeding. In the Motion, counsel for Sprint represents that the City of Bristol ("Bristol") concurs with the proposed protective agreement.

On March 13, 2003, Staff filed a Response to the Motion for Protective Ruling and Proposed Protective Ruling ("Response"). Therein, Staff maintained that the Commission's Rules of Practice and Procedure, specifically 5 VAC 5-20-170, contain adequate protections for confidential information provided to the Staff. Thus, Staff requested that any protective agreement for this case not bind the Staff.

On March 19, 2003, counsel for Sprint advised that Sprint did not intend to file a reply to the Staff. Similarly, on March 20, 2003, counsel for Bristol advised that Bristol would not reply to the Staff.

In order to facilitate the efficient conduct of this proceeding, I find that a protective agreement should be adopted. Staff should follow the procedures contained in the attached protective agreement, but should not be required to sign or otherwise execute the agreement.

Rule 5 VAC 5-20-170 provides for the submission of confidential information to the Commission under seal and limits access to such information "to the members of the commission staff directly assigned to the matter as necessary in the discharge of their duties." In addition, this Rule directs the Staff to maintain the confidentiality of the information.

Staff counsel and all members of the commission staff, until otherwise ordered by the commission, shall maintain the information in strict confidence and shall not disclose its contents

to members of the public, or to other staff members not assigned to the matter.

Thus, based on Rule 5 VAC 5-20-170, Staff has the duty to maintain confidential information in “strict confidence and shall not disclose its contents.” For this reason it is established practice that Staff not be required to sign or enter protective agreements. However, Rule 5 VAC 5-20-170 does not contain explicit procedures for the treatment and handling of confidential and competitively sensitive information and provides for further Commission direction. Thus, to avoid confusion and to facilitate the efficient conduct of this proceeding, Staff is hereby directed to comply with the procedures of the attached protective agreement. Accordingly,

**IT IS DIRECTED THAT** the following Protective Agreement be adopted.

### **PROTECTIVE AGREEMENT**

IT IS DIRECTED THAT any documents, materials, and information to be filed with the Virginia State Corporation Commission (“Commission”) or produced by any party to the Commission Staff or another party that the producing party designates and clearly marks as confidential or as containing trade secret, privileged or confidential information, shall be filed, produced, examined, and used only in accordance with the conditions set forth below. Information that is generally available to the public will not be granted confidential or competitively sensitive treatment and shall not be designated as “confidential information” or “competitively sensitive information” by any party.

#### **Definitions**

(1) Information shall be considered generally available to the public: (a) when the information is publicly known at the time of disclosure; (b) when the information becomes public knowledge without violation of this Protective Ruling; (c) when the information is obtained from a third person not affiliated with this case who received such information without restrictions; and (d) when the information is independently developed by a person without access to confidential or competitively sensitive information.

(2) Confidential information shall be considered any documents, material, or information that contains privileged or confidential proprietary information.

(3) Competitively sensitive information shall be considered any documents, materials, or information that contains trade secrets, privileged or confidential commercial or financial information, which, if known to the producing party's competitors, would allow such competitors to unfairly benefit from knowledge of the producing party's work product.

### **Procedures**

(4) All confidential information and competitively sensitive information filed or produced by a party shall be used solely for the purposes of this proceeding (including any appeals).

(5) Parties shall clearly label and file under seal with the Commission all information otherwise required to be filed but considered by the party to be confidential information. Parties shall also file with the Commission a redacted version of all such documents containing confidential information. Confidential information produced to a party or the Commission Staff, but not filed with the Document Control Center, shall also be produced, examined and used in accordance with this Ruling, but redacted copies of such information shall not be required.

(6) Access to confidential information shall be provided and specifically limited to the Commission Staff and any party, their counsel and expert witnesses, and to support personnel working on this case under the supervision of said counsel or expert witnesses and to whom it is necessary that the confidential information be shown for the purposes of this proceeding, so long as each such person has executed an Agreement to Adhere to Ruling Granting Confidential

Treatment (“Agreement”), which is Attachment A to this Ruling. All Agreements shall be promptly forwarded to the producing party upon execution.

(7) Parties shall clearly label and file competitively sensitive information under seal to the Hearing Examiner for an in camera review by the Hearing Examiner and counsel for the parties. The Hearing Examiner shall determine whether or not the competitively sensitive information will be produced. In the event that the Hearing Examiner orders the production of competitively sensitive information, the persons to whom such information is to be produced shall enter into nondisclosure agreements, which are in the form of Attachment B to this Ruling. All nondisclosure agreements shall be promptly forwarded by fax to the producing party upon execution and prior to the distribution of any competitively sensitive information to the signatory of such agreement. Competitively sensitive information produced to a party or the Commission Staff, but not filed with the Document Control Center, shall also be produced, examined and used in accordance with this Ruling, but redacted copies of such information shall not be required.

(8) Commission Staff and Staff counsel are not required to sign the Agreement to Adhere to the Protective Ruling or a Nondisclosure Agreement to gain access to either confidential information or competitively sensitive information.

(9) Commission Staff or any party may object to the designation of particular information as confidential information or competitively sensitive information by filing a motion. Any review of the challenged documents, materials, or information will be conducted in camera. The burden of proving that documents, materials, or information should be designated as confidential or competitively sensitive shall be upon the proponent of such treatment. In no event shall any party disclose the confidential or competitively sensitive information it has

received subject to this Ruling absent a finding by the Hearing Examiner or the Commission that such information does not require confidential or competitively sensitive treatment.

(a) Within ten (10) business days of the filing of the motion, the party seeking confidential or competitively sensitive treatment shall file a response to the motion. The response shall address each and every document and all information that is subject to the party's motion. The response shall: (1) describe each document and the character and contents of each document; (2) explain why the information requires confidential or competitively sensitive treatment; and (3) describe the harm that might be suffered as result of the failure of the document to be treated as confidential or competitively sensitive.

(b) Within five (5) business days of the filing of the response, the party objecting to confidential or competitively sensitive treatment may file a reply.

(10) In the event that Commission Staff or any party seeks permission to grant access to any confidential information or competitively sensitive information to any person other than a person authorized to receive such information under paragraph (6) or (7) above, the party desiring permission shall obtain the consent of counsel for the producing party. In the event of a negative response, the party seeking disclosure permission may file a motion with the Commission for such permission and shall bear the burden of proving the necessity for such disclosure.

(11) The producing party shall be under no obligation to furnish confidential information or competitively sensitive information to persons other than those authorized to receive such information under paragraph (6) or (7) above unless specifically ordered by the

Commission to do so. Parties are encouraged to seek consents to the maximum extent practicable.

(12) The Clerk of the Commission is directed to maintain under seal all documents, materials, and information filed with the Commission in this proceeding that the producing party has designated as confidential or competitively sensitive information until further order of the Commission.

(13) A producing party is obligated to separate to the fullest extent practicable non-confidential or non-competitively sensitive documents, materials, and information from confidential and competitively sensitive information and to provide the non-confidential or non-competitively sensitive documents, materials, and information without restriction.

(14) To the extent that a party contends that it should not produce certain items of information because the terms of this Ruling do not provide sufficient protection to prevent harm to the producing party, the party may file a motion requesting additional protective treatment. The producing party has the burden to demonstrate that this Ruling does not provide the information sufficient protection and that the proposed restrictions are necessary.

(a) The party seeking additional protection shall produce all information for which it seeks additional protection to the Hearing Examiner under seal.

(b) The motion shall: (1) describe each document and the character and contents of each document; (2) explain for each document why the confidential or competitively sensitive treatment afforded under this Ruling is not sufficient to protect the producing party's interests; (3) describe the harm that might be suffered if the information is not afforded the higher protection; and

(4) explain any proposed additional restrictions and why such restrictions are the minimum necessary to protect that party.

(c) Within ten (10) business days of the filing of the motion, Commission Staff and any party may file a response to the motion.

(d) Within five (5) business days of the filing of any response, the producing party may file a reply.

(15) In the event Commission Staff or any party seeks to introduce at a hearing testimony, exhibits, or studies that disclose confidential information or competitively sensitive information, Commission Staff or the party seeking such introduction shall:

(a) notify the producing party at least three (3) days in advance of any such hearing regarding testimony that is not prefiled unless a shorter period would not unduly prejudice the producing party or is necessitated by the circumstances.

(b) if such testimony is prefiled, file unredacted copies of testimony, exhibits or studies with the Commission under seal, and also file with the Commission redacted copies of all such information, and serve on all parties of record redacted copies of the testimony, exhibits, or studies deleting those parts that contain references to or portions of the designated confidential or competitively sensitive information. The testimony, exhibits, or studies containing the confidential information or competitively sensitive information filed with the Commission shall be kept under seal unless and until the Commission rules to the contrary. Each party that has signed Attachment A hereof shall receive an unredacted copy of the testimony, exhibits, or studies that contains references to or portions of the confidential information. Each party that

has signed Attachment B hereof shall receive an unredacted copy of the testimony, exhibits, or studies that contains references to or portions of the competitively sensitive information.

(16) Oral testimony regarding confidential information or competitively sensitive information, if ruled admissible, will be taken in camera and that portion of the transcript recording such testimony shall be placed in the record under seal.

(17) No person authorized under this Ruling to have access to confidential information or competitively sensitive information shall disseminate, communicate, or reveal any such confidential or competitively sensitive information to any person not specifically authorized under this Ruling or subsequent order or ruling by the Commission to have access.

(18) At the conclusion of this proceeding (including any appeals), any originals or reproductions of any confidential information or competitively sensitive information produced pursuant to this Ruling shall be returned to the producing party or destroyed if requested to do so by the producing party. At such time, any originals or reproductions of any confidential information or competitively sensitive information in Commission Staff's possession will be returned to the producing party, destroyed or kept with Commission Staff's permanent work papers in a manner that will preserve the confidentiality of the confidential information or competitively sensitive information. Insofar as the provisions of this Ruling restrict the communications and use of the confidential information or competitively sensitive information produced hereunder, such restrictions shall continue to be binding after the conclusion of this proceeding (including any appeals) as to the confidential information or competitively sensitive information.



(19) Any party who obtains confidential information or competitively sensitive information and thereafter misuses it in any way shall be subject to sanctions as the Commission may deem appropriate, in addition to any other liabilities that might attach from such misuse.

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Alexander F. Skirpan, Jr.  
Hearing Examiner

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

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**AGREEMENT TO ADHERE TO PROTECTIVE RULING**

I, \_\_\_\_\_, on behalf of and representing  
\_\_\_\_\_, hereby acknowledge having read and understood the terms of the  
Protective Ruling entered in this proceeding by the Hearing Examiner on March 25, 2003, and  
agree to treat all confidential information that I receive in connection with Case No. PUC-2002-  
00231 as set forth in that Ruling.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

On behalf of: \_\_\_\_\_

Date: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

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**NONDISCLOSURE AGREEMENT**

I, \_\_\_\_\_, on behalf of and representing  
\_\_\_\_\_, hereby acknowledge having read and understood the terms of the  
Protective Ruling entered in this proceeding by the Hearing Examiner on March 25, 2003, and  
agree to treat all Competitively Sensitive Information that I receive in connection with Case No.  
PUC-2002-00231 as set forth in that Ruling and with the following considerations:

- (1) Access shall be specifically limited to counsel and expert witnesses and to appropriate support personnel working on this proceeding under the supervision of counsel or the expert witness.
- (2) Any person who could potentially use this Competitively Sensitive Information for marketing or whose knowledge of the producing party's work product would provide an unfair competitive benefit to the receiving party shall be denied access to such information.

- (3) I shall not disseminate, communicate, or reveal in any manner Competitively Sensitive Information to any person not authorized under this Nondisclosure Agreement.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

On behalf of: \_\_\_\_\_

Date: \_\_\_\_\_

Job Title: \_\_\_\_\_